No. 10,931

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

On Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

WALTER I. CARPENETI,
354 South Spring Street, Los Angeles 13, California,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes and Texts

No. 10,931

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

On Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the United States District Court for the Southern District of California, Honorable J. F. T. O'Connor, District Judge, is reported at 52 F. Supp. 256, 1944 A.M.C. 829.

JURISDICTION.

This is an appeal from a final judgment for the plaintiff entered by the United States District Court for the Southern District of California, Central Division, in a civil action by the Union Oil Company of California against William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, to recover tonnage tax assessed and paid upon plaintiff's vessel the S.S. *Montebello.*

STATEMENT OF THE CASE.

The brief for the appellant has set out the statement of the case. To the facts set out therein, we wish to call the Court's attention to the following:

That on January 25, 1939, the Director decided an application for refund of tonnage taxes in favor of the M/S *Ontariolite* and on February 24, 1938, the Director had decided an application in favor of the *Rotterdam.* (Fdgs. 20, 21, R. 65.) That the Panamanian S.S. *Santa Maria* was permitted to enter at the Port of San Francisco and pay tonnage tax at the rate of 2 cents per ton, having completed a voyage similar to the voyage of the *Montebello.* (Fdgs. 23, R. 66.)

SUMMARY OF ARGUMENTS.

I.

The Collector of Customs may be sued in the District Court for the recovery of tonnage taxes illegally collected. The common law right of suit against the Collector of Customs in matters other than customs matters has not been changed by statutory enactment.

The collector's refusal to accept a master's oath on entry showing the vessel as being entered from Vancouver, B. C., Canada, constituted compulsion and in cases of compulsion no payment under protest is necessary.

II.

The District Court has jurisdiction of a controversy involving the assessment and collection of tonnage taxes. The Act of 1884 does not limit nor deprive the District Court of jurisdiction. The Act was a reorganization measure and it was not intended to affect the jurisdiction of the Court. The District Courts are specifically granted jurisdiction of tonnage tax cases.

III.

The tonnage taxes were improperly assessed. The *Montebello* entered Port San Luis from Vancouver, B. C., from whence she had cleared. She had *entered Vancouver* from Talara, Peru.

ARGUMENT.

I. SUIT WILL LIE AGAINST THE COLLECTOR OF CUSTOMS TO RECOVER THE AMOUNT OF TONNAGE TAX ERRONEOUSLY ASSESSED.

It is alleged in appellant's brief: first, that statutory authority for a suit against the collector existed only between 1864 and 1890, and no longer exists. (Brief, page 10); and second, that no right of action exists at common law against the collector under the circumstances of this case.

Appellee's position has always been that its right of action was the common law right. We therefore can dispense with the first part of appellant's first argument.

Appellee respectfully submits that such a right of action against the collector exists at common law. *De Lima v. Bidwell,* 182 U. S. 1 (1901); *Ogden v. Maxwell,* 3 Blatchf. 319, Federal Case No. 10,458 (18 Fed. Cases p. 613); *Cosulich Line of Trieste v. Elting,* 40 F. (2d) 220 (1930 C.C.A. 2); *Border Line Transportation Co. v. Haas,* 128 F. (2d) 192 (1942 C.C.A. 9).

Appellant has sought to distinguish the situation in the cases cited from that existing in the present case and in the course of his considerable discussion has brought in rules of law, decisions and statutes covering customs matters. While appellee does not believe that this Honorable Court will be confused by this discussion, appellee desires to point out that customs matters are a field apart. Congress has through the years gradually established a special

tribunal and special procedure to cover the customs field. Where the Collector of Customs acts in matters within the sphere of the tariff laws and the Customs Administrative acts, then the relief, if any, of the taxpayer is statutory. 17 *Corpus Juris,* 642 ff.

The appellee is making no claims under the tariff statutes. However, since it is the Collector of Customs that is being sued, the question arises immediately whether he is being sued under the customs laws or not. *In re Fassett,* 142 U. S. 479 (1892); *De Lima v. Bidwell,* 182 U. S. 1 (1901).

In *De Lima v. Bidwell,* 182 U. S. 1, the Court pointed this out (at pp. 176-177):

> Conceding, then, that Section 3011 has been repealed, and that no remedy exists under the customs administrative act, does it follow that no action whatever will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. If an action lay at common law, the repeal of Sections 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the board of general appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by Section 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise," or any other matter which the importer might have brought before the board of

> general appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the customs administrative act.

However, appellant seeks to evade the effect of these cases on the grounds that payment by appellee was not under protest. (The first time the question of protest was raised is in appellant's brief.) Appellant supports his position by the citation of *Elliott v. Swartout,* 10 Pet. 137 (1836). The *Elliott* case recognizes an exception where suit may lie even though no protest be filed. The Court points out this exception or distinction as follows (at pp. 156-157):

> But the distinction taken in the case of *Ripley v. Gelston,* is recognized and adopted; that the cases which exempt an agent when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion or extorted as a condition * * *

The *Ripley* case, as the Court points out, is a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. In order to get the clearance, the money was paid. In the instant case, the master of the *Montebello* when he arrived at Port San Luis tried to file a master's oath showing the *Montebello* as arriving from Vancouver, Canada. The deputy collector refused to accept such an oath. (Fdg. 12, R. 63.) The master had little choice but to comply. The master was faced with the alternative of accepting the collector's interpretation or placing his vessel, worth many hun-

dreds of thousands of dollars, in jeopardy of forfeiture for the mere two or three hundred dollars involved in the tonnage tax dispute.

In *Ogden v. Maxwell,* Fed. Case 10,458, 18 Fed. Cas. 613, the Court held that no protest was necessary. In that case, the collector issued a permit to land the baggage of the steerage passengers but charged at the rate of 20 cents for each five passengers.

II. THE DETERMINATION OF THE DIRECTOR IS NOT FINAL AND CONCLUSIVE. THE ACT OF 1884 DID NOT DEPRIVE THE COURTS OF JURISDICTION; THE JUDICIARY ACT SPECIFICALLY GIVES JURISDICTION TO THE DISTRICT COURT.

Appellant argues that the Act of July 5, 1884 (23 Stat. 119, 46 U. S. C. A. 3) makes the decision of the Commissioner of Navigation (now Director of the Bureau of Marine Inspection and Navigation) final.

In his discussion of this phase of the case, the appellant has again confused customs jurisprudence with tonnage tax matters and proceedings under statutory authority with actions at common law. We will attempt to follow appellant's arguments in order.

In his preliminary statement of his argument, appellant states his objection to appellee's method in pursuing its remedies; appellant argues (Brief, p. 25) that appellee in its complaint did not seek review of the Director's decision. He seeks to buttress his implication that this denied appellee any relief on the grounds that in the *North German Lloyd (North*

German Lloyd S.S. Co. v. Hedden, 43 Fed. 17) and *Laidlaw (Laidlaw v. Abraham,* 43 Fed. 297) the plaintiff expressly sought review of the Director's decision. What appellant overlooks is that these cases were brought under a statute (R. S. 2931) giving a right of action against the collector which statute was later repealed, whereas the instant case is based on the common law right of suit against the collector, which was reinstated by repeal of the statute. (*De Lima v. Bidwell,* 182 U. S. 1.)

Secondly, appellant's claim that *Cary v. Curtis,* 3 How. 236 (1845), established that the Court had no jurisdiction again confuses the situation applicable to customs jurisprudence. In the first place, *Cary v. Curtis* had reference to the actions involving customs duties, and Congress with reference to customs matters immediately passed the Act of February 26, 1845, 5 Stat. 727, restoring a right of action as to customs matters. In the second place, the Supreme Court in *De Lima v. Bidwell,* 182 U. S. 1, explains that *Cary v. Curtis* and similar cases,

> "dealt only with imported merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he has seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws * * *
>
> The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him * * *"

Finally, the argument resolves itself as to which of the two decisions interpreting the Act of 1884 is to be followed, *North German Lloyd Steamship Co. v. Hedden,* 43 Fed. 17 (May 21, 1890) or *Laidlaw v. Abraham,* 43 Fed. 297 (August 18, 1890).

Appellee respectfully submits that:

(1) The *Laidlaw* decision is entitled to more weight.

(2) The considered opinion of the executive branch was that the Courts have jurisdiction.

(3) Congress did not intend to deprive the Courts of jurisdiction.

1.

The North German Lloyd case versus the Laidlaw case.

In the *North German Lloyd* case the Court raised the question of jurisdiction, *sua sponte,* the Court remarking as to defendant's counsel's failure to even brief the question of jurisdiction (at pp. 23-4):

> * * * on the other hand, the labor and responsibility of the court have been increased by the omission of defendant's counsel to furnish any assistance towards the solution of the questions and permitting them to pass *sub silentio.*

We call attention to this for two reasons, first because it indicates that the Government, through its executive department, considered the Court had jurisdiction, and secondly because the Court did not consider the full background of the Act, that is, that Congress may have merely intended the finality of the Commissioner's decision should relate to the internal

workings of the Department, inasmuch as the entire Act related to a reorganization of the Bureau of Navigation within the Treasury Department.

If the Court had considered the intent of Congress, its decision would be entitled to greater weight. Likewise, the Government's failure to object to the jurisdiction of the Court is a mirror of the fact that at that time the Government, to-wit, the Executive Department, believed the Court to have jurisdiction. This is borne out by the fact that in an opinion rendered June 12, 1885, the Attorney General ruled (18 Op. Atty. Genl. 197) that the act in question was *designed* to terminate the right of appellate review formerly existing in the Secretary of the Treasury and the Department of State.

However, the objections that can be urged against the *North German Lloyd* decision cannot be urged against the *Laidlaw* decision. In the latter case, the decision was rendered only after a second demurrer and constituted a reversal of its previous decision. The question of jurisdiction was directly presented to the Court and the intent of Congress considered. How well can best be judged from the language of the Court (pp. 299-300):

> The only other point made in support of the demurrer is that the decision on the appeal to the Secretary was, under the Act of July 5, 1884 (23 St. 118), in fact made by the Commissioner of Navigation, and is by said act made final, and is therefore a bar to this action.
>
> This act is entitled "An act to constitute a Bureau of Navigation in the treasury depart-

ment". The commissioner created by it is charged, "under the direction of the secretary of the treasury" with many duties concerning "the commercial, marine, and merchant seaman of the United States;" and, by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2391, 3011, Rev. St. as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department.

But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to side track into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising from appeals from the exaction of the same by collectors.

The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is

> "final" in the department, as it would not be but for this provision.
>
> This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away.
>
> The appeal to the department has simply been decided by the commissioner, rather than the secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once.

That the decision was brought to the notice of the Attorney General's office is seen in the extensive quotations contained in 20 Op. Atty. Gen. 367, wherein the *Laidlaw* case is cited as an authority on the subject, and no mention is made of the *North German Lloyd* case. Certainly this connotes acquiescence in the *Laidlaw* decision.

The *Laidlaw* case is accepted by the leading authorities as representing the law. In Corpus Juris, Vol. 58, section 27, at page 39, we find the following:

> *Remedies of person charged with, or liable for, Tax or Duties:* A person from whom tonnage or light duties have wrongfully been exacted may recover back by action, from Collector of Customs, the amount so wrongfully exacted, notwithstanding certain remedies in the Treasury Department which may be pursued under statute.

Cited as authority is the *Laidlaw* case.

In the annotations of the United States Code Annotated, the *North German Lloyd* case is merely

quoted as to the constitutionality of the act, whereas the *Laidlaw* case is quoted as to jurisdiction of the courts. (46 U.S.C.A., Section 3, Notes to Decisions.)

Moreover, in two recent cases before the District Court, *Tanker Corp. v. Bryan,* 1338 BH, and *British Ministry of Shipping v. Bryan,* 1337 B, the question of jurisdiction was not raised by the Government at the trial. This issue was raised on appeal only after the issue was raised in this case. (Appeals Nos. 10,017 and 10,018.)

If thereafter, any doubt as to the true state of the law exists, such doubt should be resolved in favor of the taxpayer. *Lawder v. Stone,* 187 U.S. 281; *Crooks v. Harrelson,* 282 U.S. 55; *Ross v. Fuller,* 17 Fed. 224.

As the instant case is the first case in which this question has apparently been raised since 1895, the long-continued acquiescence by the Government should foreclose it from raising the issue anew.

All other things being equal the Laidlaw case should be given preference as a precedent.

The *Laidlaw* case, being of a later date, is entitled to preference. In Black's *Law of Judicial Precedents,* Hornbook Series, Section 30, it is stated (p. 94):

> In the case of two precedents on the same question, which are theoretically of equal authority, but are discordant and irreconcilable, the general rule is to follow the later rather than the earlier of them.
>
> *Harper v. Clarlesworth,* 4 Barn. & Co. 589;
> *Allen's Estates,* 109 Pa. 489, 1 Atl. 82.

The *Laidlaw* case is entitled to preference as a precedent since the question of jurisdiction was directly raised by demurrer, and therefore presumably exhaustively argued by counsel and maturely considered by the Court; whereas, in the *North German Lloyd* case the issue was raised by the Court as an incident to a trial on the merits, and the question was not even briefed by the Government. In *Black,* supra, section 37, it is stated (p. 107):

> The authority of a precedent is greatly increased by the fact that the case was exhaustively argued by counsel and fully and maturely considered by the court; and, on the other hand it is diminished by the fact that the case was submitted without argument or on scanty or insufficient argument.

In the *Laidlaw* case, the question was decided after a reargument and a reconsideration of the case, the Court changing its opinion in the same case (see 42 Fed. 401). In *Black,* supra, section 37, it is stated (pp. 108-109):

> And moreover, the importance of a decision is augmented by the fact that it was not rendered until after a reargument or reconsideration of the case.
>
> *Corton v. Falkner,* 4 Durn. & E. 568;
>
> *Chicago etc. Ry. Co. v. Van Cleave,* 52 Kan. 665, 33 Pac. 472.
>
> * * * * * * *
>
> Also it is to be noted that when a court changes its opinion in the same case, the later decision is entitled to additional respect from the fact that

> it evidences a more careful and mature deliberation given to the case, and therefore more likely to be satisfactory in the thoroughness and soundness of its reasoning. Thus it is said in an English case: "Lord B's judgment in Lawson v. Lawson [4 B.P.C. 21] is entitled to the greater weight, because, when the point first came before him, he entertained a different opinion."
>
> *Wilkinson v. Atkinson,* 1 Turn. & R. 257.

The taking of jurisdiction by the Court in no way prejudices the rights of the Government. If the Director was correct in his decision, the Court will so find. If, however, he was not correct, the appellee would be forever barred from a recovery, if the Court failed to take jurisdiction. In *Black,* supra, p. 321, it is stated that Courts will refuse to follow a precedent which would create a situation resulting in the denial of a legal remedy. See also *Kinney v. Connant,* 166 Fed. 720, 92 C.C.A. 410.

Moreover, the *Laidlaw* case presents a more reasonable view of the Congressional intention, as shown by legislative action in 1911 and further discussed infra.

2.

The considered opinion of the Executive Branch was that the Courts have jurisdiction.

The failure of the Government to raise any question of jurisdiction in the *North German Lloyd* case indicates it acquiesced in the jurisdiction of the Court. This was in keeping with the opinion of the Attorney General on June 12, 1885 (18 Op. Atty. Gen. 197) that

the Act terminates the right of appeal to the Secretary of the Treasury and the Department of State. Moreover, on March 23, 1892, the Attorney General in an opinion as to the President's power to reverse a decision of the commissioner (20 Op. Atty. Genl. 367), advised the President of the *Laidlaw* case, and of its decision that the appellant had the right to bring action in the Courts but pointed out that the President did not have the power to reverse such a decision.

3.

Congress did not intend to deprive the Courts of jurisdiction.

Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury for a refund of tonnage tax (Act of June 30, 1864), and to the Department of State upon the interpretation of treaties involving the collection of said tax.

The Act of July 5, 1884, it is admitted was a reorganization measure. Its author, Representative Dingley, stated as to its purposes (Vol. 15, Congressional Record, Part 4):

> It constitutes in the Treasury Department a bureau of navigation, or practically consolidates the duties that are now performed by divers officers in that Department so as to bring them into one bureau under one efficient head similar in its general functions to the British board of trade * * * with this divided responsibility, as stated by the Secretary of the Treasury in his last report, there is no official under our government who feels charged with the administration and the care of the laws relating to the merchant marine of the country.

Moreover, all the shipping interests joined in the request for enactment, something they would not likely do if it took from them the right to appeal to the Courts. Moreover, the remarks about bureaucrats and the dangers of bureaucracy by even the proponents of the measure indicate that Congress did not intend to deprive the Courts of jurisdiction. It merely sought to create an orderly system to make some one responsible and to make him the last resort as far as administrative appeals were concerned. In the past, there were many who could rule and many to whom appeals could be taken. It made for chaos, confusion, and uncertainty. Now the new system would establish as far as the administrative branch was concerned, one head, whose decision could not be reviewed by the Secretary of the Treasury, the Secretary of State, the General Accounting Office or the Comptroller General.

Finally, it must be remembered that Congress (which is presumed to know of prior judicial decisions) is presumed to know of the *North German Lloyd* and *Laidlaw* decisions at the time of its codification of the laws relating to the judiciary. In the Act of March 3, 1911, c. 231, sec. 24, par. 5, Congress provided:

> The district courts shall have original jurisdiction as follows:
> * * * * * * *
> Fifth. * * * of all cases arising * * * from revenue from * * * tonnage. * * *

If Congress did not intend that the District Courts should have jurisdiction over tonnage tax cases, then

the language plainly is superfluous—a construction to be avoided under the ordinary rules of statutory construction.

Kohlsaat v. Murphy, 96 U.S. 153;
United States v. Andrews Co., 15 Ct. Cust. Appls., 412.

To hold that the District Court does not have jurisdiction is to render useless and meaningless these provisions of the Act of 1911. They are a positive act of Congress, there could be no mistaking the intent of Congress, no possible confusion as to what was intended. The District Court was to have jurisdiction. As against that, there is only one decision of the Circuit Court where the Court itself raised the issue and decided adversely to jurisdiction without considering the situation the Act of 1884 sought to remedy.

Moreover, it must now be considered that since the langauge of the Act of 1911 (likewise carried into the codification of 1926, United States Code) is clear and unambiguous, the Courts have no right to give any meaning to such language other than that conveyed by the words, terms, or expression in which the legislative will is embodied.

Lewis v. United States, 92 U.S. 618-621;
Thornley v. United States, 113 U.S. 310-313;
Lake County v. Rollins, 130 U.S. 662, 670-671;
United States v. Goldenberg, 168 U.S. 95, 102-103;
Allen Steel Co. v. United States, 16 Ct. Cust. Appls. 26.

The term, revenue law, when used in connection with the jurisdiction of Courts of the United States,

includes tonnage taxes. *United States v. Hill,* 123 U.S. 681.

Moreover, it can further be seen that Congress did not intend at the time it passed the Act of 1884 to deprive Courts of jurisdiction in this case by the language it employed. Let us consider that language:

> * * * and on all questions of interpretation growing out of the execution of laws relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

First, his findings are final not only as to *facts* but as to the *law* ("all questions of interpretation"); secondly, even when the collection of taxes is admittedly *erroneous* or *illegal* his decision is final.

Carried to its logical conclusion, if appellant's position is sound the Courts cannot look into his decision even if his interpretation of the law is erroneous or where admittedly the collection is or was *illegal.*

If such had been the Congressional intent, it would have been a simple matter to provide that the Courts were not to have jurisdiction. (Compare *Wilson & Co. v. United States,* 311 U.S. 104.)

In view of the legislative history, in view of the language employed, is it not more reasonable to say that Congress intended merely to remedy the confusion of having many separate parts of the Executive Branch handle what could more properly be handled by one man, with no thought of depriving the Courts of jurisdiction.

III. THE DIRECTOR'S ACTION WAS CAPRICIOUS, ARBITRARY AND UNJUST.

The brief of the appellant (pp. 41-42) intimates that if the Courts take jurisdiction of the subject matter, they would not have the ability to cope with the language and criteria involved in the determination of tonnage tax cases. This is indeed a novel proposition.

Such conflicting decisions as evidenced in this case and in the *Ontariolite* and *Rotterdam* cases, and the illogical bases of distinguishing the facts involved, are no great advertisement for the appellant's proposition. Moreover, in the *Santa Maria* case, on an identical voyage, the 2 cent rate was applied by the Collector at San Francisco.

Consideration of the statute shows how clearly arbitrary and capricious was the action of the Collector. The act (Act of August 5, 1909, c. 6, Sec. 36, 36 Stat. 111 [46 U.S.C. (1940) 121] provides:

> A tonnage duty of 2 cents per ton not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

The statute uses the word, "entry" from any foreign port. If such "entry" is from any port in the region from North America to the coast of South America bordering on the Caribbean Sea, the tonnage tax is 2 cents. In the instant case, the question arises, did it enter from Talara, Peru, or from Ioco (Vancouver), B. C.?

In order to determine the issue, consideration must be given to two questions:

(1) For what port was the vessel bound when it cleared from Talara, Peru, and

(2) Did the fact that the vessel sailed in ballast from Ioco for Port San Luis affect its status?

With respect to the first question:

The *Montebello* took a cargo of oil from Los Angeles and delivered part of it at Iquique, Valparaiso, and Antofagasta, Chile; then she sailed in ballast to Talara, Peru, where she loaded a cargo of oil for Ioco, B. C., sailed there and discharged completely and then cleared for Port San Luis.

There seems no more logical reason to assume that the voyage started at Talara, than at any of the points in Chile, or even in Los Angeles.

If a vessel touches incidentally at a foreign intermediate port, in order to obtain ship's stores, bunkers, etc., appellee recognizes that it is not entering from that port. But where the vessel actually enters and clears, it must be considered as entering from that port.

In Treasury Decision No. 11949, the question related to tonnage dues on vessels from Germany and England. If the vessels entered from Germany they were entitled to exemption, but not if they entered from England. In that case the vessels leaving German ports in ballast, proceeded to Shields, England, for bunker coal to be used as fuel during the voyage. Some vessels actually entered and cleared, while others did not. The Bureau of Navigation, on an opinion from the Attorney General, held:

> * * * that a vessel touching as aforesaid at an intermediate port at which it neither enters nor clears, and which touching is a mere incident of the voyage, will not be deprived of the exemption derived from sailing from a port in Germany, such being its port of departure.

However, a contrary view was indicated if the vessel actually entered and cleared. See also Treasury Decision 10379.

In 25 Op. Atty. Gen. 157, it was ruled that if a vessel discharged all its cargo at Guantanamo, Cuba, and then proceeded to the United States, it was to be considered as coming from Guantanamo.

The foregoing dispels the fear voiced by the appellant (Brief, pp. 44-45) that the purpose of the law would be defeated by the adoption of the last port doctrine. It is obvious that incidental touching at 2 cent rate ports would not afford such vessels the benefit of a 2 cent rate. It can hardly be considered an incidental touching where the vessel unlades its entire cargo.

A case also somewhat in point is that of *The African Prince* (D.C. Mass., 1914), 212 Fed. 552. In that case the law involved was a quarantine law requiring that a health certificate from a United States official be obtained at the port of departure by a vessel at a foreign port "clearing for any port or place in the United States." The record showed that the vessel, after obtaining such a certificate, departed from Yokohama for Kobe, where it remained ten hours, although none of the crew, passengers or merchandise was landed, and then cleared for Mojii, without obtaining a health certificate. Prior to clearance from Mojii, the certificate was obtained. She visited several other ports from which she obtained certificates, and finally came to the United States. The Government contended that the word "clearing" in the statute means "sailing from" or "leaving" a foreign port, and that the words "for the United States" meant setting out with the United States as her ultimate destination, even though it may be intended to touch at intermediate ports.

The Court held that the term "clearing" should be used in the technical significance in which the term is used in our laws and that the vessel "cleared" for Mojii—that the vessel did not "clear for the United States" until it "cleared" at the last port of departure prior to reaching the United States.

A reference to that case makes it clear that a vessel "enters" from that foreign port from which she last "cleared". In other words, the *Montebello,* in order

to discharge her cargo, or transact any other trading activity at Ioco, would have had to "enter" and "clear" at the custom house. Then at the time of clearance she would have "cleared" for Port San Luis.

In regard to a tanker such as the *Montebello,* there is no such thing as a voyage—other than that the lading and discharge of a cargo constitutes a voyage. The tanker keeps on going in a circle of the oil ports, until repairs force a lay-off. The last port of discharge is the port from which it enters.

Appellee cited supra the *Ontariolite* and *Rotterdam* cases. (R. 24-26; 27-29; Fdgs. XIX, XX.) Except that those vessels are foreign owned, the facts are analogous—in the case of the former they are identical. In that case the Director states:

> From the information before the Bureau, it appears that your office is of the opinion that this vessel is in regular trade with Port San Luis, and that when she left Talara, Peru, on the voyage in question, her ultimate destination was Los Angeles, California, via Vancouver, B.C.
>
> The application of the owner of the vessel in question indicates that the *Ontariolite,* in the case under consideration, loaded a cargo at Talara, Peru, destined for discharge at Vancouver, B.C., Canada; that all the cargo laden on board at Talara, Peru, was discharged in Canada; and that the vessel proceeded in ballast to Port San Luis to load a full cargo of crude oil for discharge at Ioco, B.C., Canada. (R. 24-25.)

There the Collector contended for the very thing that the Director holds in the instant case, but the Collector was reversed in that case.

The *Santa Maria* case is also identical (Fdg. XXI). Also in that case the only point of difference is the fact that that vessel was of foreign registry.

If Talara, Peru, was not the port wherein the voyage started in the case of those vessels, it is not the beginning of the voyage in the instant case.

To uphold the Director's decision in this case is to uphold a patent discrimination in favor of foreign flag vessels.

With respect to the second question, supra:

The fact that a vessel arrives in ballast is of no moment. (See the cases of the *Ontariolite, Rotterdam* and *Santa Maria.*)

In 25 Op. Atty. Gen. 157, the question was whether a vessel coming from the Guantanamo naval base in ballast was exempt from tonnage taxes. The Attorney General held that it made no difference whether it came in ballast or with freight picked up at that port—it was to be considered as entering from that port.

We cannot concede that the Master's statement on entry should be binding on the vessel in this instance. Here the master had to show Talara, Peru, because the Collector refused to accept entry showing Vancouver, B.C. (Fdg. XII). As is pointed out in appellant's brief, note 28, a vessel is denied clearance until the prescribed amount is paid. Likewise, insistence of

the master in showing Vancouver, B.C., as the port from which he entered would subject his vessel to seizure as well as place him in jeopardy.

The Government cannot deny that the Collector will refuse to accept an entry or, if accepted, will subject a vessel to forfeiture, if in his opinion any statements of fact on entry are contrary to his ideas of what the facts should be. Under such circumstances the master of the vessel has no recourse.

The history of the *Ontariolite* and *Rotterdam* cases indicates that the Collector was not satisfied with the interpretation of the tonnage tax statute. Thus he exacted excessive tonnage taxes in those cases, and was reversed. How many other reversals took place we do not know. Whether the form of the entry convinced the Director in this case, we do not know, as it is unimportant to a decision herein.

The main thing is that there is not now, and never has been a long continued administrative practice which has been in any way uniform.

Furthermore, the statements in the entry did not influence the Collector as claimed by the appellant. That the Collector did not rely on the master's statement on entry is seen by the Collector's own admission, in his letter of May 9, 1941 (R. 19):

> "Inquiry of Captain Andreasen, the Master, at time of entry developed that on October 23, 1940. * * *"

If the Collector had relied on the Master's statement, why was any inquiry necessary? Moreover the

Captain was not permitted to make an entry showing entry from Vancouver.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

Dated, Los Angeles, California,
May 9, 1945.

WALTER I. CARPENETI,
Attorney for Appellee.